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RIGHTS OF LANDLORD AGAINST TENANT WHEN PART OF THE DEMISED PROPERTY HAS, WITHOUT FRAUD, BEEN INCLUDED IN A PRIOR LEASE TO A THIRD PARTY. — (*From Prof. Gray's Lectures.*) — In *Neale v. Mackenzie* (1 M. & W. 747), the second lease was by parol, and expired before the first. The Court held that as to the part carried by the first lease, the second lease was utterly void; and, as the rent was reserved in respect of all the land professed to be demised, that the landlord was not entitled to distrain for the whole or any part of the rent.

In *Ecclesiastical Commissioners v. O'Connor* (9 Ir. Com. L. Rep. 242), the second lease was under seal, and extended beyond the time of the expiration of the first lease. It was held that the second lease operated as a demise of the reversion of the part covered by the first lease, with the rent incident thereto, and conveyed to the tenant the whole interest in respect of which the rent was reserved. The landlord was accordingly allowed to recover the entire rent.

The manifest injustice of refusing to the landlord any compensation for the occupation of his property when the portion from which the tenant was excluded was, perhaps, of little or no value, and the exclusion caused by a mere mistake as to boundaries, is only partially met by the decision in *Ecclesiastical Commissioners v. O'Connor*. The injustice is the same whether the second lease be written or oral, or for a longer or a shorter term than the first, or if the first conveyance is in fee. A more equitable rule is indicated by Nelson, C. J., in *Lawrence v. French* (25 Wend. 442), where, while he decides that the landlord may not distrain for any part of the *rent*, he suggests that he may obtain compensation for the use and occupation of his premises under a *quantum meruit*.

CORRESPONDENCE.

TWO RECENT "TRUST" CASES.

CINCINNATI, OHIO.

BEARING on some of the questions raised by Mr. F. J. Stimson, in his interesting article on "Trusts," in the October number of the REVIEW, permit me to call attention to two decisions of the Superior Court of Cincinnati, in general term. The first was the case of *Geo. Hafer* against the N.Y., L.E., & W. R.R. Co. *et al.*, reported in 14 Weekly Law Bulletin, 68. The facts were as follows: Holders of a majority of the stock of the Cincinnati, Hamilton, & Dayton Railroad Company, through three of their number whom they appointed their trustees for the purpose, made a contract with the New York, Lake Erie, & Western Railroad Company and Hugh J. Jewett, its president, by which it was agreed that their stock should be registered on the books of the company in the name of Jewett; that Jewett should, from time to time, deliver to the appointee of the board of directors of the N.Y., L.E., & W. R.R. Co. an irrevocable proxy to vote these shares at the election of directors of the C., H., & D. R.R. Co.; the certificates, though registered in the name of Jewett, were to remain in the custody of the three trustees, who were to issue to the

owners of the stock respectively "pool certificates" equal in amount to the shares of stock owned by each, and finally, the N.Y., L.E., & W. R.R. Co. guaranteed the holders of the "pool certificates" (which certificates were freely bought and sold in the market) a perpetual semi-annual dividend of three per cent. This contract was made in 1882, and the parties carried out its provisions through the years 1882, 1883, and 1884. In May, 1885, the plaintiff, as owner of a large amount of stock not included in the "pool," filed his petition against Jewett, the two railroad companies, and the three trustees, alleging the agreement to be unlawful, and praying that Jewett be restrained from delivering to the appointee of the N.Y., L.E., & W. R.R. Co. the proxy to vote the shares at the ensuing or any subsequent election of directors of the C., H., & D. R.R. Co. There seems to have been an understanding between Jewett and plaintiff, for the latter did not ask that the former be himself restrained from voting these shares. The N.Y., L.E., & W. R.R. Co., however, filed a cross-petition, praying, first, that Jewett be restrained from refusing to deliver the proxy to its appointee; or, failing this, second, from giving a proxy to any one else, and from voting the stock himself. The Court granted the relief prayed for by plaintiff, and that secondly asked for by the N.Y., L.E., & W. R.R. Co. The Court based its action upon two grounds. The first is that it is settled law in Ohio that one corporation cannot be a stockholder in another corporation, and that one corporation cannot be permitted indirectly to acquire the control of another which it is forbidden directly to obtain by acquisition of the latter's stock. The second and more comprehensive ground is, that an agreement by stockholders of a corporation for a pecuniary consideration, to transfer the right to vote upon their stock, is against public policy, illegal, and void.¹

The second case was that of *Griffith* against *Jewett et al.*, reported in 15 Weekly Law Bulletin, 419, and like the first related to the stock of the C., H., & D. R.R. Co. The alleged purpose of this second "trust" was beneficent; it was "in order that the stock of said company shall not be liable to be bought up for speculative control, and to secure safe and prudent management in the interest of the public, as well as the stockholders," and to prevent consolidation or lease of the road, etc., "without full knowledge and due consideration on the part of stockholders." The trust agreement, which is set out at full length in the report, in substance was as follows: The owners of a majority of the stock, in consideration of one dollar paid to each, agreed to sell their stock to the trustees, each vendor receiving in return a trust certificate for as many shares "of the beneficial interest in the capital stock" of the company as he had furnished shares of stock; the trustees were to collect the dividends on the stock, and distribute them ratably among the trust certificate holders; the trust was to continue for five years, and at the expiration of that time was to be determinable only by the consent of two-thirds of the holders of the trust certificates; the stockholders, parties to the trust, constituted the trustees, by power of attorney irrevocable during the existence of the trust, their proxies to vote the stock. The trust certificates, in terms, enured to the holder "and assigns." The plaintiff, together with certain cross-petitioners, averring ownership of a large amount of these trust certificates, made a tender of the certificates to the trustees, with the re-

¹ Cf. cases collected in Pollock, Contracts, 2d Am. ed. p. 286, note (h).

quest that the shares of stock represented by them be transferred on the books of the company to the holders of the certificates, and a refusal by the trustees, and that the trustees intended to vote the stock so represented contrary to the wishes of the holders of the certificates, prayed that the trustees be restrained from voting said stock, and compelled to transfer to them on the books of the company the shares represented by certificates held by them.

The Court granted an order restraining the trustees from voting the stock represented by the certificates held by the plaintiff and these cross-petitioners. Another cross-petitioner, owner of stock not included in the "trust," also asked an injunction restraining the trustees from voting any of the stock embraced in the trust, on the ground of the illegality of the trust agreement.—The Court held that he was not entitled to any relief; that the trust agreement was not unlawful, save in so far as it provided that the proxy given it should be irrevocable, and so long as a stockholder who had given a power of attorney was content to let his proxy vote for him, no one else could complain. This conclusion is believed to be correct, though at first blush it may seem to be inconsistent with the decision in *Hafer's case*; it follows necessarily from the admitted lawfulness of proxies. If it be claimed that every stockholder has the right to the exercise of the personal judgment and opinion of every other in the voting at an election, the claim goes to the extent of denying the right to give a proxy at all for such purpose. The failure to annul the proxy is a continuous renewal of it, and approval of what may be done under it. It must be taken to be true that the constituent, so long as he does not object, confirms the acts of his attorney. The unlawful feature of the trust in the *Griffith case* was the provision that the power of attorney should be irrevocable; that, although the constituent might desire action of one kind, he was bound to suffer his proxy to take action perhaps of the very opposite kind. The decision is to the effect that though a stockholder may appoint an agent to vote his stock he cannot effectually bind himself not to revoke the agency; but so long as he is satisfied to have it continue no one else can complain. The *Hafer case*, while not denying this, decides that where a stockholder creates such an agency in consideration of a pecuniary benefit enuring to himself, in which the other stockholders do not share, thus creating in himself an interest hostile to theirs, the other stockholders may justly complain. In the *Hafer case* there was a clear agreement of sale of the right to vote the stock in consideration of a guaranty of a dividend on the stock embraced in the agreement, giving the holders of such stock a pecuniary advantage not enjoyed by the other stockholders. In the *Griffith case* there was no provision for any benefit to the members of the "pool" which would enure to them to the exclusion of other stockholders; there was simply an agreement among the holders of the majority of the stock to have their stock voted *en bloc*, so as to retain control of the corporation by themselves, and this was held to be not unlawful; but it was denied all executory force, inasmuch as it was held that any party to it might at any time refuse to be any longer bound by it.

Gustavus H. Wald.